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HEARING BEFORE THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON THE CONSTITUTION

ON

THE GAO'S RECENT REPORT ON THE IMPLEMENTATION OF  
EXECUTIVE ORDER 12630 AND THE STATE OF  
FEDERAL AGENCY PROTECTIONS OF PRIVATE PROPERTY RIGHTS

OCTOBER 16, 2003

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TESTIMONY OF STEVEN J. EAGLE  
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Mr. Chairman, Representative Nadler, and distinguished members of the Subcommittee:

My name is Steven J. Eagle. I am a professor of law at George Mason University, in Arlington, Virginia. I testify today in my individual capacity as a teacher of property and constitutional law. My principal research interest is the study of the interface of private property rights and government regulatory powers. I am the author of a treatise on property rights, entitled *Regulatory Takings* (third edition forthcoming in 2004), and write extensively on takings issues. I also lecture at programs for lawyers and judges and serve as chair of the Land Use and Zoning Committee of the American Bar Association's Section of Real Property, Probate and Trust Law. I thank the subcommittee for giving me this opportunity to appear.

The immediate occasion for the Subcommittee's evaluation of the state of federal agency protections of private property rights is the publication of the report prepared for it by the General Accounting Office on "Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use" (GAO Report).<sup>1</sup> The Subcommittee asked that the GAO review implementation of Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights" (EO, or EO 12630)<sup>2</sup> by the Department of Justice. The Subcommittee also asked that the GAO review compliance with the EO by four governmental agencies, the Department of Agriculture, the U.S. Army Corps of Engineers, the Environmental Protection Agency (EPA), and the Department of the Interior (collectively, the "four agencies").

Unfortunately, Mr. Chairman, the GAO Report provides scant assurance that private property rights are being protected, or that government agencies are using prudent fiscal management. The Department of Justice has not updated its "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" (Guidelines),<sup>3</sup> in spite of significant changes in the Supreme Court's regulatory takings case law during the 15 years following its promulgation. Furthermore, as the GAO's understated subheading put it: "Agencies Report That They Fully

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<sup>1</sup> U.S. General Accounting Office Report 03-1015 (Sept. 19, 2003).

<sup>2</sup> 53 Fed. Reg. 8859 (Mar. 15, 1988).

<sup>3</sup> Mar. 18, 1988, printed at 18 *Env'tl. L. Rep.* 35168 (1988).

Consider the Takings Implications of Their Planned Actions but Provided Little Evidence to Support This Claim.”<sup>4</sup>

In my opinion, Mr. Chairman, the Department of Justice has failed to follow the EO’s mandate that it update its guidelines to “reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.”<sup>5</sup> Also in my view, the failure of the four agencies to provide records indicating compliance compels the promulgation of requirements that agencies undertake all mandated takings implication assessments in writing, preserve these assessments with the permanent records of the determinations that they support, and adequately log their compliance. Finally, Mr. Chairman, I suggest that if the Department of Justice and the four agencies do not demonstrate remediation of these deficiencies within a reasonable period of time, the Subcommittee should consider the introduction of legislation mandating the necessary correctives or even according affected citizens or the public standing to contest the adequacy of takings implication assessments (TIAs) in agency proceedings and courts of law.

### **The Purposes and Requirements of Executive Order 12630**

EO 12630 was issued by President Reagan in 1988, and was impelled by the reasons specified in its preamble and in its first section, “Purposes”:

[I]n order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows. ...<sup>6</sup>

Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions

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<sup>4</sup> GAO Report at 16.

<sup>5</sup> EO at §1(c).

<sup>6</sup> *Id.* at preamble.

carefully to prevent unnecessary takings and should account in decision-making for those taking that are necessitated by statutory mandate.<sup>7</sup>

The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action.<sup>8</sup>

The EO mandated that the Attorney General promulgate the Guidelines, which were published contemporaneously with it. According to the Guidelines:

In planning and carrying out federal program policies and actions undertaken by statute and otherwise, government officials have the obligation to be fiscally responsible. In addition, they must respect the constitutional rights of individuals who are affected by those program policies and actions. Accordingly, officials must be aware of and avoid, to the extent possible and consistent with the obligations imposed by law, actions that may inadvertently result in takings. Where such taking risk cannot be wholly avoided, responsible government officials should, to the extent possible and consistent with the obligations imposed by law, minimize the potential financial impact of takings by appropriate planning and implementation. To do this, officials must make decisions informed by the general and specific principles of takings case law.<sup>9</sup>

The provisions of both the EO and Guidelines weave together the twin purposes animating the EO, protection for private property rights and the need for responsible financial planning. Prudent fiscal planning and financial accountability alone do not explain some of the EO's purposes. In issuing EO 12630, the President endeavored to ensure that federal departments and agencies operate "for the Constitution," by giving "due regard for the constitutional protections" accorded property rights.<sup>10</sup> This implies that governmental regulation of property must be solicitous of the Due Process, Just Compensation, and Public Use Clauses of the Fifth Amendment. As Justice William Brennan noted, "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to pro-

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<sup>7</sup> *Id.* at §1(b).

<sup>8</sup> *Id.* at §1(c).

<sup>9</sup> *Id.* at § V.A.5.

<sup>10</sup> *Id.* at preamble and §1(c).

mote the public good just as effectively as formal condemnation or physical invasion of property.”<sup>11</sup>

Although the Supreme Court has never adequately clarified its takings jurisprudence, for over 75 years Justice Oliver Wendell Holmes admonition has prevailed: “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>12</sup> As the Court subsequently recognized in *Armstrong v. United States*, the Takings Clause was “designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>13</sup>

The EO’s admonition that agencies act “to prevent unnecessary takings” is explained both in terms of avoiding unnecessary expenditures for just compensation and preventing the imposition of unnecessary hardship on citizens.<sup>14</sup> Preservation of the public fisc benefits from accomplishing governmental purposes through alternatives less expensive than condemnation of private property. Avoiding unnecessary hardship refers to the fact that most individuals and businesses do not have their property up for sale at any given moment. They would not accept an unsolicited bid at fair market value, since the moving is both disruptive and expensive. Yet the constitutional measure of “just compensation” is “fair market value.”<sup>15</sup> For this reason, “[c]ompensation in the constitutional sense is therefore not full compensation.”<sup>16</sup> The willingness of an agency to pay just compensation means only it places a value on the property that exceeds the market price. It does not mean that the agency values the property more than its owner does. In many cases, therefore, the compelled transfer of property from citizen to government may make society the poorer. The EO seeks to avoid such a result where possible.

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<sup>11</sup> *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

<sup>12</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>13</sup> 364 U.S. 40, 49 (1960).

<sup>14</sup> EO at §1(b).

<sup>15</sup> *United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

<sup>16</sup> *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988).

## The Attorney General's Guidelines are Substantially Out of Date

The Guidelines is a document of over 13,500 words, which, together with the EO, has as its purpose “to assure that governmental decisionmakers are *fully informed* of any potential takings implications of proposed policies and actions.”<sup>17</sup> The EO requires that “The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.” Yet, 15 years after the Guidelines were promulgated, the Department of Justice takes the position that no updating is necessary.<sup>18</sup> The four agencies are evenly split on whether revision of the Guidelines would be helpful, with the EPA and the Army Corps of Engineers responding in the negative and the Departments of Agriculture and the Interior indicating that an update would be helpful to their staffs.<sup>19</sup>

Neither the Department of Justice nor any of the four agencies asserted that revisions of the Guidelines would be harmful. If the even split among the four agencies is at all representative, it would seem that many government departments and agencies would find revisions beneficial. Likewise, given that attorneys in the Department of Justice litigate takings issues on a regular basis, the Guidelines could be redrafted at a modest cost.

The Guidelines explain the Supreme Court's takings case law. In doing so, they make extensive use of cases decided by inferior courts, principally the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Federal Claims (CFC) and its predecessors. By necessity, the Supreme Court makes general pronouncements based on cases presenting particular facts. These dicta are fleshed out in lower court opinions. It is difficult to conceive of a Department of Justice brief in a takings case that would cite only Supreme Court holdings and not refer to Federal Circuit and CFC cases applying those holdings in varied factual contexts.

Even were the Department of Justice correct in asserting that Supreme Court precedent has not fundamentally changed, there would be a need to update the Guidelines. When the Guidelines were crafted in 1988, the Attorney General deemed a moderately detailed and nuanced presentation necessary to comport with the EO's mandate. Such a presentation remains

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<sup>17</sup> Guidelines at §I.A. (emphasis added).

<sup>18</sup> GAO Report at 9.

<sup>19</sup> *Id.*

necessary now. If there are reasons why the precedent of moderate detail and incorporation of lower court cases now is unsound, it is incumbent upon the Attorney General to elucidate them.

However, the fact is that there have been fundamental changes in the Supreme Court's takings doctrine since the Guidelines went into effect.

### **Analyses of Specific Supreme Court Decisions**

The following analyses do not purport to be comprehensive. I attempt only to illustrate some of the principal changes in Supreme Court takings jurisprudence since 1988 that necessitate revisions of the Guidelines.

‡ ***Penn Central Transportation Co. v. City of New York (1978)***,<sup>20</sup> *Penn Central* is the source of the Court's principal regulatory takings test. It referred to regulatory takings determinations as "essentially ad hoc, factual inquiries," in which "several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."<sup>21</sup>

The Court's recent reaffirmation of the primary role of *Penn Central* emphatically does not mean that there have been no fundamental changes in the Supreme Court's takings jurisprudence. *Penn Central* is extraordinarily amorphous, and subsequent cases impose important limitations and qualifications upon it that will prove outcome determinative in some cases and vital for agencies to understand in many more. Some of these qualifications will be noted in the following discussions of post-1988 cases.

‡ ***Lucas v. South Carolina Coastal Council (1992)***,<sup>22</sup> *Lucas* established that a government regulation depriving an owner of all viable economic use of his or her property is a

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<sup>20</sup> 438 U.S. 104 (1978).

<sup>21</sup> *Id.* at 124.

<sup>22</sup> 505 U.S. 1003, 1015 (1992).

categorical taking, “without case-specific inquiry into the public interest advanced in support of the restraint” under *Penn Central*.<sup>23</sup> The Court recently has made it clear that the retention of even relatively small remaining interests by owners exclude them from the benefit of the *Lucas* rule.<sup>24</sup> Likewise, retention of the right to enjoyment following even a substantial moratorium on use is inconsistent with the total deprivation envisioned by *Lucas*.<sup>25</sup> Nevertheless, *Lucas* is controlling where there is complete and permanent deprivation of use. It should be noted that two panels of the Federal Circuit have reached conflicting judgments as to whether owners invoking *Lucas* must meet the *Penn Central* investment-backed expectations in the uses they assert.<sup>26</sup>

‡ ***Dolan v. City of Tigard (1994)***.<sup>27</sup> The Court in *Dolan* established that a government entity demanding an exaction of property in exchange for granting development approval must demonstrate a “rough proportionality” between the exaction and the problems created by the proposed development. The government would have the burden of coming forward with evidence that it had made an “individualized determination” of the need. However, *Dolan* purported to apply to “adjudicative” decisions involving individual parcels and not to “legislative determinations classifying entire areas of the city.”<sup>28</sup> The Court subsequently refused to consider why takings principles should be different depending upon whether the injury to the property owner resulted from an “adjudicative” or “legislative” determination.<sup>29</sup> It also stated that the *Do-*

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<sup>23</sup> *Id.* at 1015.

<sup>24</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). “Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle.’” *Id.* at 631.

<sup>25</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

<sup>26</sup> *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999) (yes); *Palm Beach Isles Assocs v. United States*, 231 F.3d 1354, *reh’g in banc denied*, 231 F.3d 1365 (Fed. Cir. 2000) (no).

<sup>27</sup> 512 U.S. 374 (1994).

<sup>28</sup> *Id.* at 385.

<sup>29</sup> *Parking Ass’n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116, 1116 (1995) (Thomas, J., dissenting).

lan rough proportionality test is “inapposite” to cases involving denials of development instead of exactions.<sup>30</sup>

‡ *Suitum v. Tahoe Regional Planning Agency* (1997).<sup>31</sup> *Suitum* considered the “ripeness” for adjudication of an alleged regulatory taking resulting from an agency determination that the petitioner be forbidden to build upon her lot in the foothills above the lake, and given transferable development rights (TDRs) in mitigation. The agency insisted that the claim was not ripe for judicial review until the TDRs were sold, but the Court held that the TDRs could be appraised in the same manner as other assets. *Suitum* also described its regulatory takings ripeness test as “prudential,” presumably as distinguished from its being constitutionally required.<sup>32</sup> While “ripeness” is an immensely vexing issue respecting challenges in federal court to alleged state regulatory takings,<sup>33</sup> *Suitum* is useful in analyzing whether federal agency determinations are ripe for judicial review and supports the practical approach to ripeness later expanded upon in *Palazzolo*.<sup>34</sup>

‡ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999).<sup>35</sup> This case provides that a federal district court may refer to a jury the questions of whether there has been a taking and whether a governmental entity has accorded the property owner due process of law in applying its own regulations. *Del Monte Dunes* was the first case in which the Court upheld an award of regulatory takings damages. An important subtext is Court’s almost palpable view—expressed in its adoption of the petitioner’s view of the facts—that the city’s repeated refusals to approve development plans satisfying all of its prior objections was pretextual. *Del Monte Dunes* thus imports to takings law a good faith doctrine. It is vital that government agencies be aware of it and it should be adumbrated in Guidelines revisions. Furthermore, the Solicitor General’s office made repeated and strong attempts in *Del Monte Dunes* to get the Court to

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<sup>30</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999).

<sup>31</sup> 520 U.S. 725 (1997).

<sup>32</sup> *Id.* at 733.

<sup>33</sup> *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985). See John J. Delaney & Duane J. Desiderio, “Who Will Clean Up the ‘Ripeness Mess’? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse,” 31 *Urb. Law.* 195 (1999).

<sup>34</sup> *Suitum*, 520 U.S., at 740-743.

<sup>35</sup> 526 U.S. 687 (1999).

review its *Agins* “substantially advance a legitimate governmental purpose” doctrine, asserting that the concept is associated with substantive due process and is not a legitimate takings test. The Court declined to act.<sup>36</sup>

‡ ***Palazzolo v. Rhode Island* (2001).**<sup>37</sup> *Palazzolo* rejects the strong form of the regulatory takings notice rule. In *Lucas*, the Court excepted, from its holding that the complete deprivation of viable economic use constitutes a taking, the deprivation of uses to which the owner did not have an existing right under “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”<sup>38</sup> The Court refused to adopt Rhode Island’s view that the purchase of land subsequent to the promulgation of environmental regulations precluded the owner from challenging those regulations under the Takings Clause. “[A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title. . . . A law does not become a background principle for subsequent owners by enactment itself.”<sup>39</sup> However, *Palazzolo* does provide some undefined role for the notice rule. The concurring opinion of Justice Sandra Day O’Connor, whose vote was necessary for the Court’s majority, stated that “[t]he temptation to adopt what amount to *per se* rules in either direction must be resisted,” and that the significance of preacquisition regulations must be determined by application of the *Penn Central* multifactor test.

*Palazzolo* also indicated that the Court will employ a common sense standard as to when agency determinations are sufficiently well settled as to be “ripe” for judicial review. The Court noted that here, its prior decisions “make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands . . . . Further permit applications were not necessary to establish this point.”<sup>40</sup>

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<sup>36</sup> *Agins v. City of Tiburon*, 447 U.S. 255 (1980). See Steven J. Eagle, “*Del Monte Dunes, Good Faith, and Land Use Regulation*,” 30 *Envtl. L. Rep.* 10100, 10107 (2000).

<sup>37</sup> 533 U.S. 606 (2001).

<sup>38</sup> *Lucas*, 505 U.S. at 1029.

<sup>39</sup> *Palazzolo*, 533 U.S. at 629-630.

<sup>40</sup> *Id.* at 621.

Finally, the Court refused to consider the owner's "relevant parcel" claim, since it had not been properly raised below. *Palazzolo* was remanded to the state courts for consideration of the landowner's *Penn Central* partial takings claim.

‡ ***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002)**<sup>41</sup>

In order to preserve the clarity of Lake Tahoe, moratoria have been imposed precluding development of the landowners' parcels in the foothills surrounding the lake from 1981 through the present day. However, for procedural reasons, the Court considered only two moratoria in force during a 32-month period in 1981-1984. Likewise for procedural reasons, the petitioners brought only a *Lucas* claim, alleging that the ordinances, on their face, constituted a complete deprivation of property. They did not claim that the ordinances, as applied to them, constituted a partial taking under *Penn Central*. The Court refused to apply the *Lucas* rule to the 32-month period in which the petitioners had suffered a total deprivation, but rather held that the multifactor *Penn Central* test was appropriate, since the temporary deprivation should be considered in the context of the owners' use rights after the expiration of the moratoria along with other facts and circumstances.

The Court discussed "seven theories" under which a court might conclude that a temporary development moratorium might constitute a compensable taking. It noted that four of those were unavailable for procedural reasons. These included the arguments that ostensibly separate moratoria constituted one "rolling" moratorium, that the agency acted in bad faith under *Del Monte Dunes*, that the regulation did not advance a substantial state interest under *Agins*, and that fairness and justice would require compensation in light of the facts of the case under *Penn Central*. Notably, the Court added: "It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism."<sup>42</sup>

‡ ***Brown v. Legal Foundation of Washington* (2003)**.<sup>43</sup> In *Brown*, the Court upheld a state "interest on lawyers' trust accounts" (IOLTA) program, under which lawyers were

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<sup>41</sup> 535 U.S. 302 (2002).

<sup>42</sup> *Id.* at 341.

<sup>43</sup> 123 S.Ct. 1406 (2003).

required to deposit client funds in bank accounts in which interest generated would benefit state designated legal services organizations. Not included in the IOLTA requirement were client funds that were capable of generating “net interest” after expenses were they deposited in separate bank accounts in the clients’ names. While the Court affirmed that interest generated by clients’ funds in the IOLTA accounts belonged to those clients,<sup>44</sup> it reasoned that the inability of the small or short-term balances to generate “net interest” apart from the IOLTA program resulted in no taking. Of particular interest for present purposes is that the Court’s agreement “that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*’s ad hoc analysis.”<sup>45</sup> The key was that the state was taking the interest for its own use rather than regulating the owner’s use of it. “When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.”<sup>46</sup>

*Brown* is a new refinement of the distinction between *Lucas* categorical takings and *Penn Central* partial takings, and will have many applications in takings law.

## **Analysis of Specific Topics**

### **| The Role of Partial Regulatory Takings.**

Supporters of expanded governmental regulation over private property rights might argue that the reaffirmation of *Penn Central* in *Palazzolo* and *Tahoe-Sierra* indicates no fundamental change in the Supreme Court’s post-EO regulatory takings jurisprudence. Yet it is clear that *Palazzolo* and *Tahoe-Sierra* support the understanding that *Penn Central* affirmatively provides for partial regulatory takings—a concept that some who might deny the existence of substantial change are unwilling to read into *Penn Central* itself.

In *Palazzolo*, the Court stated, far more clearly than it had in any prior case, that even if a regulation does not eliminate “all economically beneficial use,” and therefore does not result in a taking under *Lucas*, the regulation may still result in a regulatory taking under *Penn Central*. Prior to *Palazzolo*, some lower

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<sup>44</sup> *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998).

<sup>45</sup> *Brown*, 123 S.Ct. at 1419.

<sup>46</sup> *Id.* at 1418 (quoting *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)).

courts had applied one basic standard: that a regulation results in a taking if it eliminates essentially all of a property's value. *Palazzolo* conflicts with this approach by distinguishing between *Lucas* "total taking" claims and *Penn Central* claims. *Palazzolo* strongly suggests, though it does not decide the issue, that the evidence that *Palazzolo*'s property retained a value of \$200,000 was not sufficient, by itself, to defeat the *Penn Central* taking claim.

While *Palazzolo* clearly recognizes the existence of the *so-called Penn Central test*, the Court has not defined with any precision the scope of this type of taking claim or the standards governing its application. If, as discussed above, preacquisition notice must be a relevant factor in both a *Lucas* case and a *Penn Central* case, the differences between these two categories of takings may turn out to be rather slight. In any event, by providing new support for the *Penn Central* test, *Palazzolo* will generate *many new questions* about this test and how it should be applied.<sup>47</sup>

### ‡ **Determining the Relevant Parcel.**

*Penn Central* said that courts analyzing regulatory takings cases should consider the "parcel as a whole."<sup>48</sup> *Lucas* noted that ascertaining the relevant parcel was a "difficult question,"<sup>49</sup> and *Palazzolo* seemed to call for the rule's reexamination.<sup>50</sup> One year later, *Tahoe-Sierra* endorsed the *Penn Central* parcel as a whole concept.<sup>51</sup> Nevertheless, during the period between *Penn Central* and *Tahoe-Sierra* the lower courts have considered many factual nuances that go into a relevant parcel determination, examining the circumstances under which the property was acquired and parts of the property sold, the physical nature of the property, and the extent to which parts of the property have been put to coordinated use.<sup>52</sup> Nothing in *Tahoe-Sierra* forecloses future analyses of this nature. Notably, while rejecting the notion of

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<sup>47</sup> John D. Echeverria, "A Preliminary Assessment of *Palazzolo v. Rhode Island*," 31 *Env'tl. L. Rep.* 11112, 11114 (2001) (emphasis added).

<sup>48</sup> *Penn Central*, 438 U.S. at 131.

<sup>49</sup> *Lucas*, 505 U.S. at 1016 n.7.

<sup>50</sup> *Palazzolo*, 533 U.S., at 631 ("Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule. Whatever the merits of these criticisms, we will not explore the point here.") (internal citations omitted).

<sup>51</sup> *Tahoe-Sierra*, 535 U.S. at 327.

<sup>52</sup> See, e.g., *Ciampetti v. United States*, 18 Cl.Ct. 548 (1989); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed.Cir. 1994); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000).

temporal severance of a freehold interest, *Tahoe-Sierra* leaves open the question of where there is a *Lucas* taking when a temporary development moratorium covers the entire remaining duration of a leasehold interest.

In sum, since 1988 the Supreme Court has noted in several cases the complexity of the relevant parcel problem and the lower courts have devised various rules to deal with the problem. These changes mark a significant shift notwithstanding the Court's recent affirmation that "parcel as a whole" remains the initial baseline.

#### ‡ **Investment-Backed Expectations**,

Both *Palazzolo* and *Tahoe-Sierra* have affirmed the importance of the *Penn Central* "investment-backed expectations" test. Justice O'Connor's pivotal concurrence in *Palazzolo* asserted that the Court's "polestar ... remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine."<sup>53</sup> *Tahoe-Sierra* seconded this analysis.<sup>54</sup> However, *Palazzolo* cautioned that the state supreme court, the decision of which it was reviewing, "erred in elevating what it believed to be '[petitioner's] lack of reasonable investment-backed expectations' to 'dispositive' status. Investment-backed expectations, though important, are not talismanic under *Penn Central*."<sup>55</sup>

While the Court held in *Palazzolo* that expectations of purchasers are not necessarily bound by preexisting ordinances, it has not ruled on the role that such preacquisition rules should play. It also has not determined whether the expectations of property buyers should be constrained by the "regulatory climate" as well as by regulations in force.<sup>56</sup> Given the plasticity of the expectations concept and the inherent circuitry between legal rights based on expectations and expectations based on legal rights, it is crucial that federal agencies receive guidance on this issue that is up to date.

#### ‡ **Character of the Regulation.**

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<sup>53</sup> *Palazzolo*, 533 U.S. at 633.

<sup>54</sup> *Tahoe-Sierra*, 535 U.S. at 327 n.23.

<sup>55</sup> *Palazzolo*, 533 U.S. at 634 (brackets in original).

<sup>56</sup> *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999).

As noted earlier, *Penn Central* stated that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>57</sup> Yet regulation vs. physical invasion was a meaningful *Penn Central* test only for four years, until the Court held that permanent physical invasions constituted categorical *per se* takings.<sup>58</sup> The Supreme Court’s new *Brown IOLTA* case, discussed above, drew the distinction between regulations intended to constrain the property owner’s conduct and regulations intended to confer a benefit on government.<sup>59</sup>

In *Eastern Enterprises v. Apfel*,<sup>60</sup> decided in 1998, a plurality of the Court found a statute unconstitutional as applied, given its character as imposing “retroactive liability [that] is substantial and particularly far reaching.”<sup>61</sup> That Supreme Court cases such as *Eastern Enterprises* (and *Brown*) suggest that new content could be given the *Penn Central* characterization test was brought home in a recent Court of Federal Claims decision involving a very expensive and specialized fishing vessel that was the subject of legislation precluding it, and it alone, from entering service.<sup>62</sup> “The plurality opinion in *Eastern Enterprises* ... suggests that, in considering the character of a governmental action alleged to constitute a taking, at least two [non-*Penn Central*] factors are also relevant: (1) whether the action is retroactive in effect, and if so, the degree of retroactivity; and (2) whether the action is targeted at a particular individual. Both factors are present here.”<sup>63</sup>

These important additions to the meaning of a basic *Penn Central* test should be incorporated in updated Department of Justice Guidelines.

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<sup>57</sup> 438 U.S., at 124.

<sup>58</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>59</sup> *Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406, 1418 (2003).

<sup>60</sup> 524 U.S. 498 (1998).

<sup>61</sup> *Id.* at 534.

<sup>62</sup> *American Pelagic Fishing Co., L.P., v. United States*, 49 Fed.Cl. 36 (2001) (liability); 55 Fed.Cl. 575 (2003) (damages).

<sup>63</sup> *Id.* at 49 Fed.Cl. 50 (citing *Eastern Enterprises*, 524 U.S. at 532-37).

## **The GAO has been Unable to Secure Evidence of Compliance with EO 12630**

One of the most troubling aspects of the GAO Report is the fact that the four agencies being reviewed for compliance with EO 12630 did not demonstrate that they take its requirements seriously. This situation should be corrected through better management within the executive branch or by the Congress.

### **Guidelines and Statistics**

The GAO Report contains numerous mentions of EO 12630 requirements that are not enforced, of paperwork that is lost, of regulatory processes that apparently wandered off during some passage of time, and of procedures that assertedly were performed but are undocumented.

The Report relates that, although the EO requires annual compilations of just compensation awards, the Office of Management and Budget (OMB) has informed departments and agencies that they need not bother, since such awards are paid by the Treasury's Judgment Fund and not by them.<sup>64</sup> Yet aggregate totals of these awards provide valuable information about the state of private property rights, and the externalization of the cost of awards to the Treasury does not motivate agencies to reduce them. Even for the period before the OMB action, the agencies had difficulty in documenting their submissions "because of the passage of time."<sup>65</sup>

The Attorney General did not issue Supplemental Guidelines for the Department of Agriculture because of substantive disagreements relating to grazing permits on public lands. Beyond that, "Justice and Agriculture officials also indicated that other issues may have been unresolved, but because of passage of time (nearly 10 years) and the purging of older files, they could not identify other possible reasons why Agriculture's guidelines were not completed."<sup>66</sup>

It also is not clear whether categorical exclusions from the TIA process makes potential abuses of property owners' rights difficult or impossible to discern. For instance, when the De-

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<sup>64</sup> GAO Report at 14-16.

<sup>65</sup> *Id.* at 15 n.21.

<sup>66</sup> *Id.* at 13 & n.18.

partment of Justice issued agency specific Supplemental Guidelines for the Army Corps of Engineers and EPA in early 1989 and Interior in 1993, it included categorical exclusions for matters such as nonlegislative actions to which affected owners consented (Interior), and denials “without prejudice,” in which owners could reapply (ACE).<sup>67</sup> Given the arduous nature of appeals from agency determinations, “consent” to overreaching might be the logical option for a beleaguered property owner. Likewise, owners might have accepted “non-prejudicial” denials without refilling, rather than demonstrate the futility of continuing to refine and submit applications.

I am not asserting that the four agencies, or others, behaved in such an inappropriate manner. I do suggest, Mr. Chairman, that a sampling by GAO of agency actions excluded from the requirements of EO 12630 might discern whether such abuse exists.

#### **Documentation of Individual Assessments.**

As might be expected, agencies that had trouble devising rules and compiling aggregate data did not document doing an adequate job in performing individual takings implication assessments (TIAs). According to the GAO, “[t]he four agencies said that they fully consider the potential takings implications of their planned regulatory actions, but provided us with limited documentary evidence to support this claim.”<sup>68</sup> “Agencies provided us with a few written examples of takings implication assessments. Agency officials said that these assessments are not always documented in writing, and, because of the passage of time, those assessments that were put in writing may no longer be on file.”<sup>69</sup> Even when written assessments are made, they might be expunged from the records.<sup>70</sup>

Even with respect to notices of proposed and final rulemaking appearing in the *Federal Register*, “relatively few” notices mentioned the EO, and most of those contained only a “simple statement that the EO was considered and, in general, that there were no significant takings im-

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<sup>67</sup> GAO Report at 12-13.

<sup>68</sup> *Id.* at 16.

<sup>69</sup> *Id.* at 17.

<sup>70</sup> *See, id.* (noting that the Corps of Engineers internal policies require that TIAs be removed from the file once the agency has made a permit decision).

plications.”<sup>71</sup> The GAO analysis of 375 proposed and final rules published in the *Federal Register* found only 50 instances where any sort of TIA was mentioned, and only ten finding significant takings implications.<sup>72</sup>

### **Analysis of Takings Awards and Settlements**

According to information supplied the GAO by the Department of Justice, 44 regulatory takings cases brought against the four agencies were concluded during fiscal years 2000 through 2002. The just compensation awarded by the Court of Federal Claims in two cases totaled \$4.2 million. In addition, the Department of Justice settled 12 additional claims, aggregating \$32.3 million.<sup>73</sup>

The four agencies informed the GAO that only three of the 14 cases in which just compensation was awarded or a financial settlement made were subject to OE 12630. Of those, only in one case was a TIA performed.<sup>74</sup> While these numbers are too small to be statistically meaningful, they are not comforting.

### **Possible Solutions to Ineffective Protection of Property Rights Under EO 12630**

As my testimony has noted, Mr. Chairman, I believe that the Attorney General has been remiss in not updating the takings analysis of EO 12360, and that the Department of Justice and OMB have failed to put in place procedures to ensure that departments and agencies comport with the requirements of the EO.

### **Administrative Action**

The most direct and cost efficient solution to this problem is for the Department of Justice Guidelines to be rewritten and for it, OMB, and the agencies involved to strengthen their rules. This would entail that TIAs be more detailed than sweeping and generalized statements that policies and decisions have no takings implications. On the other hand, in many situations it

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<sup>71</sup> *Id.* at 18.

<sup>72</sup> *Id.* at 19.

<sup>73</sup> *Id.* at 20.

probably would not be necessary for individualized determinations to be made with respect to each property owner who potentially would be affected.

The challenge is to create some mechanism within agencies that would ensure fully adequate but not overly burdensome compliance. As a check to ensure that such a mechanism is working properly, the Department of Justice Guidelines and Supplemental Guidelines for individual agencies should provide for (1) written TIAs, agency logs, and aggregate data; (2) the retention of these records by the agencies and the submission of aggregate data to the Justice Department or other monitoring agencies; and (3) the periodic auditing of EO 12630 performance through random sampling and other quality control techniques.

If executive branch agencies cannot effectively mandate these necessary tasks, it might be necessary for the Congress to enact remedial legislation.

### **Private Rights of Action**

EO 12630 provides that it “is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.”<sup>75</sup> Thus, claims that an agency violated the EO fail as a matter of law.<sup>76</sup>

If the steps I have outlined above prove unworkable, legislation might be enacted providing standing for either those directly affected by inadequate TIAs, or for citizens generally, to challenge inadequate the process in administrative and judicial proceedings. This would make the protection of private property rights more directly comparable to the protection of the environment under such statutes as the National Environmental Policy Act (NEPA), which requires federal agencies to assess the environmental consequences of, and alternatives to, their pro-

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<sup>74</sup> *Id.*

<sup>75</sup> EO 12630, §6.

<sup>76</sup> *Duval Ranching Co. v. Glickman*, 965 F.Supp. 1427, 1446 (D. Nev. 1997); *McKinley v. United States*, 828 F.Supp. 888, 893 (D. N.M.1993).

posed actions and policies,<sup>77</sup> and the environmental laws that provide for citizen enforcement as “private attorneys general” through the filing of federal lawsuits.<sup>78</sup>

I recognize, Mr. Chairman, that some would object to making TIAs available on the grounds that they would give property owners and others a roadmap for suit against the United States. That is one of the reasons why I would reserve the provision of affected owner and citizen suits as a last resort if other measures fail. The object would be not to award damages, but to encourage compliance with constitutionally protected property rights.

## **Conclusion**

The subject matter of today’s hearing is very important to protecting the rights of American citizens. I commend the Subcommittee for giving property rights, and EO 12630, the attention they deserve.

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<sup>77</sup> See National Environmental Policy Act, 42 U.S.C. § 4332 (1994).

<sup>78</sup> See, e.g., Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2000); Clean Water Act, 33 U.S.C. § 1365 (2000); Clean Air Act, 42 U.S.C. § 7604 (2000).